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DEPARTMENT OF WATER SUPPLY

COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAII

PETITION TO AMEND INTERIM INSTREAM FLOW STANDARDS FOR HONOPOU, HUELO (PUOLUA), HANEHOI, WAIKAMOI, ALO, WAHINEPEE, PUOHOKAMOA, HAIPUAENA, PUNALAU/KOLEA, HONOMANU, NUAAILUA, PIINAAU, PALAUHULU, OHIA (WAIANU), WAIKAMILO, KUALANI, WAILUANUI, WEST WAILUAIKI, EAST WAILUAIKI, KOPILIULA, PUAKAA, WAIOHUE, PAAKEA, WAIAAKA, KAPAULA, HANAWI, and MAKAPIPI	CASE NO. CCH-MA13-01 COUNTY OF MAUI, DEPARTMENT OF WATER SUPPLY'S REBUTTAL BRIEF; SECOND SUPPLEMENTAL DECLARATION OF DAVE TAYLOR; SUPPLEMENTAL DECLARATION OF MICHELLE MCLEAN; SUPPLEMENTAL DECLARATION OF CRAIG LEKVEN; SECOND SUPPLEMENTAL EXHIBIT LIST; EXHIBITS B-030 THROUGHT B-053; CERTIFICATE OF SERVICE

COUNTY OF MAUI, DEPARTMENT OF WATER SUPPLY'S REBUTTAL BRIEF

I. INTRODUCTION

This responsive brief, the Second Supplemental Declaration of David Taylor ("Second Supp. Taylor Dec."), the Supplemental Declaration of Michelle McLean ("Supp. McLean Dec.),

the Supplemental Declaration of Craig C. Lekven ("Supp. Lekven Dec."), DWS's Second Supplemental Exhibit List, and Exhibits "B-30" through "B-53" are hereby submitted on behalf of the County of Maui, Department of Water Supply ("DWS"). DWS is consolidating its rebuttal to the Responsive Briefs filed by Maui Tomorrow ("MT"), and Na Moku Aupuni O Ko'olau Hui ("Na Moku") in this single Rebuttal Brief.

II. NA MOKU MISTATES THE ANALYSIS CWRM MUST UNDERTAKE

Na Moku cites the Supreme Court's Decision in In Re Water Use Permit Applications, 94 Hawai'i 97, 9 P.3d 409 (2000) ("Waiahole I") for the presumption that consideration of instream public trust uses are the "precondition to all subsequent considerations." Na Moku's Responsive Brief, p. 2. In that decision, however, the Supreme Court specifically rejected that notion, which had previously been applied by the Commission on Water Resources Management ("CWRM"). In doing so, the Supreme Court stated that:

> As discussed above, by conditioning use and development on resource "conservation," article XI, section 1 does not preclude offstream use, but merely requires that all uses, offstream or instream, public or private, promote the best economic and social interests of the people of this state... Given the diverse and not necessarily complementary range of water uses, even among public trust uses alone, **we consider it neither feasible nor prudent to designate absolute priorities between broad categories of uses under the water resources trust**. Contrary to the Commission's conclusion that the trust establishes resource protection as "a categorical imperative and the precondition to all subsequent considerations," we hold that the **Commission inevitably must weigh competing public and private water uses on a case-by-case basis,** according to any appropriate standards.

Waiahole I, 94 Haw. at 141-42, 9 P.3d at 453-54 (emphasis added)(internal citations omitted). See also Kauai Springs, Inc. v. County of Kauai, 133 Haw. 141, 172, 324 P.3d 951, 982 (2014)("There are no absolute priorities between uses under the public trust, so the state and its

subdivisions must weigh competing public and private water uses on a case-by-case basis, according to any standards applicable by law")(internal citations omitted).

Further, Na Moku argues that DWS's Opening Brief "misstates and fundamentally alters well-settled law by erroneously characterizing its municipal offstream diversions (including the water EMI diverts and sells to the County) as a public trust use or purpose." Na Moku's Responsive Brief, p. 18. The law is far from "well-settled," however, as the Hawaii Supreme Court has never expressly stated that uses that are unquestionably "domestic" lose their status as part of the public trust merely by virtue of the fact that they are being provided by a municipality.[1] Indeed, whenever the Hawaii Supreme Court has ruled that a use is specifically outside the scope of the public trust, it has consistently referred to "private" or "commercial" offstream uses. See Waiahole I, 94 Haw. at 140, 9 P. 3s at 452 (explaining that National Audubon Society v. Superior Ct. of Alpine County, 33 Cal.3d 419 (1983) was not directly applicable because it involved diversions for a public purpose, the domestic uses of the City of Los Angeles while the diversions in Waiahole were for purely private commercial purposes); Id. at 142 (affirming the Water Commission's conclusion that effectively prescribes a higher level of scrutiny for private commercial uses); id. ("any balancing between public and private purposes begins with a presumption in favor of public use, access and enjoyment").

Because the Courts have been silent as to whether municipal provision of water for domestic use falls within the public trust protection of domestic use, this body may consider whether or not such use is consistent with public trust principals. Waiahole I, 94 Haw. at 448-450, 9 P.3d at 136-138. As Na Moku concedes, domestic use is specifically delineated as a

[1] In In re Iao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications, ("Na Wai Eha"), the Hawaii Supreme Court refused to rule one way or the other, instead finding that the question was not properly raised. Na Wai Eha, 128 Haw. at 244, 287 P. 3d at 145.

public trust use. Because communities are no longer situated directly around waterways, as they once were before distribution systems were established, the only source of water for domestic use for almost all of the residents of Maui comes from DWS. Accordingly, completely divorcing the ideas of domestic and municipal uses would render the protections of the former completely meaningless for the vast majority of citizens in Hawaii. Instead, the Commission should adopt a more expansive view of "domestic uses" that protects domestic use for all citizens, rather than the few who live in direct proximity to a water source. Doing so would be consistent with the history of the public trust doctrine in Hawaii, which "does not remain fixed for all time, but must conform to changing needs and circumstances." Waiahole I, 94 Haw. at 135, 9 P.3d at 447 (2000)

III. NA MOKU AND MT MISTATE THE BURDEN OF PROOF ON DWS

Both Na Moku and MT argue that DWS has failed to present the department's needs in a manner which takes into account the effect of those needs on the public trust. They argue that DWS has some sort of burden to prove that DWS' need for water does not impact the public trust uses Na Moku and MT champion. Essentially, Na Moku and MT are arguing that the evidentiary requirements for an Interim Instream Flow Standard ("IIFS") are identical to those in a Water Use Permit Application ("WUPA"). This argument misstates the law, and was explicitly rejected by the Hawaii Supreme Court in In re Iao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications, 128 Haw. 228, 287 P.3d 129 (2012)("Na Wai Eha").

For example, Na Moku cites Waiahole I, for the argument that "HC&S and the County cannot ignore 'consideration of possible harm to society through harm to the water body,' *i.e.,* to the 27 East Maui streams at issue and the coastal ecosystem supported thereby." Na Moku

Opening Brief, p. 4. Na Moku goes on to fault DWS' arguments, stating they "[ignore] the harm that arises from dewatering the 27 streams and foisted upon East Maui community residents and their cultural practices" and that "in doing so, the County turns a blind eye to how its present and proposed uses harm the larger public interest." Id. at 5. Na Moku also states that "both HC&S and the County fail to supply evidence of a proper cumulative impacts assessment of EMI's diversion." Id.

These claims are misplaced, however, as the language Na Moku cites in support of their argument that DWS' analysis must review cumulative impacts and harms to the public trust are inapplicable to IIFS proceedings. The language Na Moku derives their alleged standard from deals with the Waiahole I Court's consideration of WUPAs rather than its analysis of Interim Instream Flow Standards ("IIFS"). Waiahole I, 94 Hawai'i 97, 9 P.3d 409. Indeed, the exact same argument Na Moku makes regarding the burden on DWS was raised and summarily rejected by the Supreme Court in Na Wai Eha:.

> Hui/MTF argues that the Commission erred because it did not hold the diverting parties to a burden of proof; they argue that *Waiāhole I* requires noninstream users to justify their diversions in light of the water uses protected by the public trust. The flaw of their argument is that the portions of *Waiāhole I* that they cite apply to the WUPA process. In the context of IIFS petitions, **the water code does not place a burden of proof on any particular party**; instead, the water code and our case law interpreting the code have affirmed the **Commission's duty** to establish IIFS that 'protect instream values to the extent practicable' and 'protect the environment.'...

Na Wai Eha, 128 Hawai'i at 253, 287 P.3d at 154 (emphasis added) (internal citations omitted); *See also* Waiahole I, supra, 94 Haw. at 153, 9 P.3d at 465 ("the [IIFS] statute, however, does not assign any burden of proof.")

Na Moku uses the same flawed arguments to attack DWS analysis of future needs. Like their criticism of DWS' analysis of present needs, their criticism of DWS' analysis of future

needs is misguided because it relies on the inapplicable standard for parties seeking a WUPA rather than parties to an IIFS proceeding. Furthermore, the future needs analysis provided by DWS is, by its very nature, entirely speculative and outside of the control of DWS. The Department of Planning uses census data and socio-economic forecasts and studies in its long-range plans, and the population growth figures in the Maui Island Plan are projections based on such data, forecasts and studies. Supp. McLean Dec, ¶ 3, DWS Exhibit "B-001." Actual growth depends on a large variety of factors, including water availability and large projects typically do not receive approvals through the Planning Department unless they can demonstrate that they will have adequate water. Id. at ¶¶ 4, 5. Nowhere has DWS either demanded that the exact projections it offers actually be accommodated by the IIFS, or challenged the ability of CWRM to make determinations that fail to fully accommodate those projections. The numbers provided, and the analysis of future needs based thereon, are merely to inform CWRM of what DWS projects its future needs to be.

As DWS has stated time and again, it is in favor of an IIFS that protects the public trust purposes championed by Na Moku and MT while still allowing DWS to fulfill its mandate to provide water to its 35,251 upcountry customers. Those customers include several witnesses being called by both Na Moku (see DWS Exhibits "B-030" through "B-045") and MT (See DWS Exhibits "B-046 through "B-047), and members of Maui Tomorrow Foundation Board of Directors (see DWS Exhibits "B-048" through "B-050"), who also depend on DWS to provide them with water.[2] Second Supp. Taylor Dec. ¶¶ 2 - 23. This support, however, does not extend so far that DWS feels the need to make Na Moku and MT's case for them. DWS' has a

responsibility to assure that it can continue to provide a valuable public service as cost effectively as possible to thousands of citizens, businesses, schools, and native Hawaiian institutions residing in upcountry Maui. DWS' duty in this proceeding, as set forth by the Hawaii Supreme Court in the Waiahole I, and Na Wai Eha decisions, is to establish its needs and discuss the feasibility of meeting those needs with alternative water sources. DWS has done both. Na Moku and MT are responsible for establishing their own case regarding the stream flow needs for their promoted public trust purposes.

IV. NA MOKU AND MT MISCHARACTERIZE DWS' ANALYSIS OF ALTERNATIVES

Both Na Moku and MT have mischaracterized the DWS' analysis of alternative sources. Na Moku faults DWS for being "dismissive" of alternatives and "only [raising] the possibility of constructing two 100-300 MG reservoirs to balance out the need for water during drier days for its water treatment plants at Olinda and Piholo." These arguments fail on two grounds. To begin with, DWS' analysis does not "dismiss" any alternative sources. Its analysis nowhere states that DWS is unwilling to pursue any alternative source that is eventually mandated by CWRM's final decision in this case. DWS merely is setting forth the costs and feasibility of alternatives, as required by the Supreme Court in the Waiahole I and Na Wai Eha decisions. Neither of these decisions, nor any section of the Water Code, require DWS to make any final determination whether to adopt or dismiss an alternative. The only requirement is to present evidence as to feasibility, not to champion or chose a specific alternative. DWS has done so.

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[2] DWS is unable to offer a complete list without the addresses of witnesses and clients, as some might get service under accounts held in the names of others. DWS plans to offer a more thorough picture of DWS water use by the other parties hereto by way of cross examination during the contested case hearing.

In addition, Na Moku's statement that DWS "only raises the possibility" of two reservoirs is factually inaccurate. DWS analysis of alternative sources also includes basal ground water development (DWS Exhibit "B-16," pp. 13, 16; DWS Opening Brief, p. 12-13), 100 mgal and 200 mgal reservoirs at the Kamaole-Weir Water Treatment Plant, (DWS Exhibit "B-16," pp. 14, 16; DWS Opening Brief, p. 14) and conservation (DWS Exhibit "B-16," pp. 13, 16; DWS Opening Brief, p. 14).

MT also mischaracterizes DWS' analysis of alternative sources of water. In their responsive pleading, MT argues that increased "raw water storage is the most cost effective alternative for dealing with anticipated decreases in lower ditch flows...that MDWS has inexplicably neglected to address." MT's Responsive Brief, p. 5. Like Na Moku's statement above, MT is factually inaccurate in stating that DWS neglected to address the possibility of a new reservoir at the Kamole-Weir Water Treatment Plant. Both DWS' Opening Brief and the Expert Analysis of Craig Lekven specifically address the possibility of, and relative cost-effectiveness of a reservoir at Kamole-Weir. DWS Exhibit "B-16," pp. 14, 16; DWS Opening Brief, p. 14. MT also incorrectly states that "the County has allocated approximately $25,250,000 primarily for the design and construction of the Kamole storage reservoir at Kamole in its FY 2015 budget." MT Responsive Pleading, p. 4. As can be clearly be seen in MT's cited Exhibit "E-124," only $1,500,000 was allocated for FY 2015 to go towards land acquisition for the proposed reservoir. Second Supplemental Taylor Dec. ¶ 24. The $25,250,000 figure referenced by MT is an aggregate budget estimate for the next six years of the project. Id. That figure is not final, and the full amount has not been allocated. Id.

Finally, both Na Moku and MT mislabel raw water storage capacity as an "alternative source" of water. As stated in DWS' Responsive Brief, raw water storage is not really an "alternative source of water," because any new reservoir would be filled by water coming directly from stream flow. Supplemental Declaration of David Taylor. ¶ 10 ("Supplemental Taylor Dec."), DWS Responsive Brief, p. 5. At most, a new reservoir would decrease the need for stream water during dry periods with low stream flow, but would ultimately contribute to greater needs during wet periods, when the reservoir would need to be refilled. Supplemental Taylor Dec. ¶¶ 10, 11, DWS Responsive Brief, pp. 5-6.

VI. NA MOKU'S COMMENTS REGARDING FINANCIAL IMPACTS

No Moku makes several puzzling claims regarding DWS' analysis of alternatives. First, Na Moku argues that "until the BLNR determines the cost to divert East Maui surface water as part of a proper permitting process, the County's proffered analysis of economic impacts caused by water reductions is premature and likely overstated." Under this theory, DWS would be completely incapable of providing any analysis of alternatives in this contested case hearing. Taking this suggestion at face value would make it ultimately impossible for DWS to offer any sort of alternative source analysis, in direct conflict with the clear requirements set forth by the Supreme Court in the Waiahole I and Na Wai Eha decisions.

Additionally, Na Moku argues that DWS cannot argue negative economic impacts because DWS does not make a profit. This argument is nonsensical. The costs of providing water has a direct effect on the ability of DWS to fulfill its mandate to assure that citizens of the county have access to affordable water. Additional costs are directly passed on to the individual customers, who DWS has a duty to protect the interests of. Broken down to represent each water customer of DWS, those alternative sources have life-cycle costs that would amount to between $586 and $2,342 per

customer. Supp. Lekven Dec. ¶ 3; DWS Exhibit "B-51." Na Moku cannot argue that those costs are somehow irrelevant just by virtue of the fact that DWS is a public entity providing a valuable public service rather than a for-profit entity concerned only with a bottom line.

VI. MT MISTATES THE "LEGAL DUTIES" OF THE COUNTY

A. MT Misstates the Nature of the Draft Water Use Development Plan

MT's reliance on the Water Use Development Plan, Upcountry District (Draft) ("DWUDP") is misplaced. As is clear from the title of the report, it is merely a draft and does not have any force of law. It has not been approved as final or implemented by the director. Second Supp. Taylor Dec. ¶ 25. It has not been approved or adopted by the Board of Water Supply. Id. ¶ 25. It has not been approved or adopted by the Maui County Council. Id. ¶ 25. Finally, it has not been approved or adopted by CWRM. Id. ¶ 25. The DWUDP is merely a draft report produced by a consultant that has not been acted upon since its release, and which was ultimately abandoned by DWS, which has decided to develop a long-range island-wide Water Use Development Plan in lieu of regional piecemeal plans. Id. ¶ 25. Accordingly, it should not be considered as DWS policy or treated as legally binding.

B. The 2000 MOU with HC&S Creates No Legal Duties Relevant to this Proceeding.

MT again attempts to argue that the 2000 Memorandum of Understanding ("MOU") between DWS and HC&S creates a legal duty on DWS. As was discussed in DWS' Responsive Pleading, the MOU, is an agreement only between DWS and HC&S, which MT is not a third-party beneficiary of, and which MT has no ability to enforce or dictate the terms of. DWS Responsive Brief, pp. 6-8, Supplemental Taylor Dec. ¶¶ 13,14.

C. MT Mischaracterizes the Underlying Facts and the Legal Duties Created by the East Maui Consent Decree

Much like their attempt to invent a duty on DWS resulting from the MOU, MT also attempts to argue that DWS has a duty resulting from the consent decree in The Coalition to Protect East Maui Water Resources, et. al. v. The County of Maui Board of Water Supply, Second Cir. Court, Civ. No. 03-01-0008(3). MT Responsive Brief, p. 6. Like the MOU, however, MT has no authority or standing to enforce any provision of the consent decree, to which it is not a party. The fact that Mark Sheehan[3] is plaintiff named in his individual capacity in the consent decree action is irrelevant. The fact that a "supporter" of MT is a party to a law suit does not make MT a party to that law suit with standing to enforce the terms of a settlement.

By way of background, the referenced consent decree was entered into after a decade of litigation regarding the implementation of the 1993 East Maui Water Plan, and specifically, the sufficiency of its EIS. Second Supp. Taylor Dec. ¶ 26. The 1993 Plan and its EIS have since been abandoned. Id. Nothing remains of the original claims in that action, except the consent decree's constraints left on DWS if and when it decides to develop a new plan to extract East Maui groundwater. Id.

Under the Consent Decree, certain long-term testing must be done to discern if withdrawal of groundwater will effect stream flow (thereby triggering CWRM's jurisdiction) before DWS can determine if East Maui groundwater is a viable source. See DWS Exhibit "B-019." This testing alone will take several years. The Coalition Plaintiffs and their attorney, Isaac Hall, Esq., have used the terms of the agreement, which requires ongoing "consultation" between DWS and the Coalition plaintiffs, as an all-out veto over DWS's attempt to conduct any

[3] Mark Sheehan is also a customer of the DWS. See Second Supp. Taylor Dec. ¶ 22; DWS Exhibit "B-049."

due diligence to properly survey the availability of East Maui groundwater, and determine if extraction has an impact on stream flow. Second Supp. Taylor Dec. ¶ 27. In fact, DWS spent two years (2011-2013) trying to work with the Coalition plaintiffs to implement USGS-recommended testing. Id. Discussions reached an impasse, with Coalition Plaintiffs failing to provide any substantive reason the USGS proposal was insufficient and ultimately enjoining DWS from taking any further steps. Id., DWS Exhibit "B-20."

The declaration that MT attached to its brief as Exhibit "E-125" is taken out of context from the County's Motion to Modify, or Alternatively Vacate, the Consent Decree. The County filed this motion because the consent decree had become unworkable. Second Supp. Taylor Dec., ¶ 28. MT has conveniently removed all portions of the "Exhibit E-125" that put the comments of the director and reasoning therefore in the proper context, including going so far as to remove paragraphs from the signature page of the filed declaration. Id., DWS Exhibit "B-52." As is becoming an exhausting trend and offensive tactic, MT is once again intentionally misrepresenting DWS' position and blatantly fabricating and manipulating the contents of their exhibits.[4] As would be clear if MT had attached the full declaration, which is attached hereto as DWS Exhibit "B-52," DWS has not simply "taken this alternative off the table," as MT argues, but rather, has had any attempt to even investigate the possibility of basal well development thoroughly and completely frustrated by the Coalition Plaintiffs. MT's Responsive Brief, p. 8; DWS Exhibit "B-52;" Second Supp. Taylor Dec. ¶¶ 26-28.

D. The Settlement with Shell Oil/Dow Chemical Creates No Legal Duty on DWS

MT also misrepresents the contents of the settlement agreement entered in Board of Water Supply of the County of Maui v. Shell Oil Co. et al., Second Circuit Court, Civ. No. 96-

0370, which it has conveniently failed to attach or cite. This action was brought by the Maui County Board of Water Supply ("BWS") against various private companies whose use of pesticides and other chemicals resulted in ground water contamination. Second Supp. Taylor Dec., ¶ 29; Exhibit "B-53." A settlement was ultimately reached between BWS and the defendants, in which defendants agreed to pay for granular activated carbon ("GAC") upgrades to existing wells whose water was contaminated by defendants' operations. Id.; Exhibit "B-53." In addition, paragraph 26 of the agreement sets forth procedures DWS must follow in order to receive reimbursement for GAC related expenses in the development of new wells, and requires defendants to pay additional costs associated with moving proposed wells. Exhibit "B-53," ¶ 26. The process is minimally obtrusive, requiring only that DWS give the defendant businesses notice and an opportunity to respond to any proposed wells. Id. The defendant businesses have no authority under the agreement to veto any proposed well. Id. Accordingly, nothing in the agreement acts to prevent DWS from constructing new wells, but instead allows for a mechanism by which DWS can be reimbursed for GAC or alternative site costs. Id. Furthermore, MT's unsubstantiated statement that "the Settlement Agreement with Dow Chemical has as much, if not greater, impact on the development of groundwater resources in the East Maui area than the Consent Decree" is demonstrably false. DWS has constructed one well,[5] had three wells[6] retrofitted with GAC modifications at the Defendants expense, and been given preliminary site approval for several other wells notwithstanding the settlement agreement.

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[4] See DWS Responsive Brief, pp.3-4.

[5] Pookela Well was constructed since the settlement agreement.

[6] Hamakuapoko Wells 1 & 2 and Napalia A Well have been retrofitted with GAC filtration systems under the terms of the settlement agreement.

Second Supp. Taylor Dec. ¶ 30. Under the terms of the Consent Decree, no new wells have been even studied, much less constructed. Second Supp. Taylor Dec. ¶ 27.

E. References to the Paia-Haiku Community Plan are Misplaced

Finally, MT argues that "the position of MDWS is inconsistent with the goals, objectives, policies and implementing actions for "Water" contained within Paia-Haiku Community Plan (1995), *enacted* by *Ordinance* No. 2415 and effective on May 17,1995." This argument is misplaced for several reasons. Most importantly, the Haiku-Paia Community Plan is largely inapplicable to these proceedings because Paia town is not served by the DWS Upcountry system, and accordingly, the water provided to citizens of Paia does not come from the 27 streams at issue in this case. Declaration of David Taylor, ¶ 6; DWS Opening Brief, n. 1, 5, 6. Furthermore, DWS has not stated any position contrary to the excerpts of the Paia-Haiku community plan provided by MT. As noted supra, DWS has set forth its current needs, its projected future needs, and analyzed the feasibility of alternative sources of water. In doing so, DWS has not taken positions which are in anyway contrary to the sections of the largely inapplicable community plan cited by MT.

DATED: Wailuku, Maui, Hawaii, February 10, 2015.

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COMMISSION ON WATER RESOURCE MANAGEMENT

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PETITION TO AMEND INTERIM INSTREAM FLOW STANDARDS FOR HONOPOU, HUELO (PUOLUA), HANEHOI, WAIKAMOI, ALO, WAHINEPEE, PUOHOKAMOA, HAIPUAENA, PUNALAU/KOLEA, HONOMANU, NUAAILUA, PIINAAU, PALAUHULU, OHIA (WAIANU), WAIKAMILO, KUALANI, WAILUANUI, WEST WAILUAIKI, EAST WAILUAIKI, KOPILIULA, PUAKAA, WAIOHUE, PAAKEA, WAIAAKA, KAPAULA, HANAWI, and MAKAPIPI	CASE NO. CCH-MA13-01 CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date a true and correct copy of the foregoing document was duly served, via email to the following, with hard copies to follow via certified mail, pursuant to the Minute Order, upon the following individuals as follows:

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